

May 15, 2014

M. Lois Bobak
Woodruff, Spradlin & Smart
555 Anton Blvd., Suite 1200
Costa Mesa, CA 92626-7670

Re: Your Request for Advice
Our File No. A-14-055

Dear Ms. Bobak:

This letter responds to your request for advice on behalf of Tustin Planning Commissioner Jeff Thompson regarding his duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹ We offer no opinion on the application of other laws, which may apply, such as common law conflict of interest. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May Commissioner Thompson participate as a member of the Planning Commission when the Planning Commission considers its recommendation to the City Council regarding the Commercial Development Guidelines (the “Guidelines”) for the Cultural Resources Overlay District (the “CRD”)?

2. May Commissioner Thompson participate in the selection of a consultant for the development of the downtown commercial core master plan (the “Core”)?: Once the consultant is selected, may Commissioner Thompson participate as a Planning Commissioner in the development of the downtown commercial core plan?

3. May the Commissioner participate in the consideration of an amendment to the city’s current second residential unit requirements?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

4. If the Commissioner has a conflict of interest in any of the decisions, can he participate in his personal capacity as a member of the public?

FACTS

The Tustin Planning Commission is composed of five Tustin citizens (including Commissioner Thompson) appointed by the City Council to hear, decide and make recommendations to the City Council on various land use and planning related issues.

The Guidelines:² Over the last several months, Tustin staff has prepared draft guidelines for commercial development within the CRD. The basic purpose of the CRD is to preserve and protect historic structures within the old town area, and to ensure that development and redevelopment within the area is consistent with the overall character of the District.

The Guidelines are intended to serve as a guide to property owners, architects, contractors, and other design professionals in understanding the City's goals for the preservation of historically significant commercial buildings and neighborhoods. Another purpose is to provide basic principles for achieving quality design and development compatible with the character of the CRD. It is hoped that the Guidelines will help property owners and design professionals in designing projects that are acceptable and consistent with the design criteria and standards established for the CRD in already adopted zoning ordinances.

The draft Guidelines does not change the permitted uses of properties within the CRD, nor do they change the development standards applicable to development, including height, setback, parking and other similar requirements. Rather, the Guidelines summarize provisions in the California Historical Building Code and other relevant state and federal standards for the preservation of historic buildings. The document contains rehabilitation guidelines for storefronts, windows, entrances, decorative elements, awnings, materials, and cleaning and painting. It also presents ideas for making a building more sustainable through increased energy efficiency, including weatherization, heating and cooling, roofs, windows, and solar technology. The Guidelines contain information on converting a historic building to a different use, and discusses site plan considerations such as compatibility, scale, mass, height, setbacks, and materials for both old reuse and rehabilitation of existing structures and new development. The Guidelines discuss location and design for surface lots, parking structures, and curbside, and make suggestions regarding appropriate landscape design, street furniture, walkways, outdoor sales and seating, fences and walls, lighting, bicycle lanes and racks, and public art. The Guidelines also discuss sign types, historic signs, and general sign guidelines.

² The Planning Commission was to consider the draft Guidelines at a public meeting scheduled for March 25, 2014. You stated in a communication dated April 4, 2014 that the item had been put over in order to obtain the Commission's advice prior to having a vote on the Guidelines.

In our telephone conversation of April 16, 2014, you clarified the following:

- The Guidelines apply to all non residential property in the CRD. Residential property would only be subject to the guidelines were the owners to go through rezoning of the residential property to commercial.
- You also provided a map that clarified the type and location of property in the CRD. While the CRD stretches across several blocks of residential property, most of the commercial property in the CRD is in the extreme eastern portion, and most of the western portion of the CRD is residential.

The Planning Commission does not have the authority to adopt the Guidelines. Rather, its role is limited to making a recommendation to the City Council for final action. You stated that you were not aware of any facts or circumstances that suggest that there is anything unique about Commissioner Thompson's properties or the proposed Guidelines that would suggest that the Guidelines would impact Commissioner Thompson's properties in a manner different from any other residential or commercial properties in or adjacent to the CRD.

The Master Plan: In February 2014, the City of Tustin issued a request for proposals from consultants interested in working with the City on the development of a master plan or similar document for the City's downtown commercial core area. The City has three basic objectives for the plan. The first is the development of an approach to the planning, design and management of public spaces within the plan area to create a "sense of space." The second objective is to identify positive attributes and design goals and policies that will help to insure that future development successfully meets the new vision. Finally, the plan will identify underutilized land and analyze existing land use patterns and regulations, and make recommendations regarding potential changes to the City's General Plan, Zoning Code and Zoning Map to implement the new vision developed by the plan.

The Second Unit Ordinance: The Planning Commission may be taking up possible amendment to the rules governing second units on single lots. The proposals may change the rule to the following: (1) prohibit new accessory guest rooms in CRD, (2) allow new second residential units on any residentially zoned lot in CRD regardless of lot size; (3) limit the maximum unit size to 50% of the primary unit (not to exceed 1,200 square feet); (4) require one garage parking space for smaller (one bedroom) second units; two garage parking spaces for larger units (two or more bedrooms), in addition to two garage parking spaces for the primary residence; (5) allow tandem garage parking spaces for new second residential units (when units are larger and a total of four garage parking spaces are required); and (6) require that impact fees (park fees, school fees, etc.) would need to be paid for all new second units.

Commissioner Thompson owns the following:

- A single family home located on property zoned for residential uses within the boundaries of the CRD. His residential property is also within 500 feet of the boundaries of property that will be subject to the guidelines.³
- An office/retail building within the CRD. That building is located on property zoned for, and actually used for, various commercial and general office uses.

CONCLUSIONS AND ANALYSIS⁴

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable⁵ that the decision will have a material financial effect on one or more of the public official’s interests.⁶ (Section 87103.)

You have identified two interests in the CRD that may result in a conflict of interest for the Commissioner, a single family home and an office/retail building. The Commissioner’s residence, while not subject to the Guidelines, is within 500 feet of property that will be subject to the guidelines. The office building is located on property zoned for, and actually used for, various commercial and general office uses and will be subject to the Guidelines.⁷

1. The Commissioner does not have a conflict of interest with respect to the Guidelines.

³ You supplemented the facts on your original letter on April 4, 2014.

⁴ Amendments to Regulations 18705.2 and 18706 were adopted by the Commission and will be submitted to the Office of Administrative Law for review. Although not currently effective, the regulations express the Commission’s policy concerning application of the conflict of interest rules of the Act. Therefore, staff is advising consistent with the Commission’s adopted policy.

⁵ A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.

⁶ When a public official who holds an office specified in Section 87200 (including planning commissioners) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the interest as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

⁷ Presumably, tenants in the Commissioner’s office building would be sources of income to the Commissioner. However, you have not asked about these sources of income and we do not analyze them here.

Residence: Revised Regulation 18705.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. As relevant to your facts, the financial effect will be material if the decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan; [or]

...

“(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, that real property. For purposes of this paragraph, any financial effect resulting from a governmental decision regarding permits or licenses issued to the official’s business entity when operating on the official’s real property shall be conclusively analyzed under Regulation 18705.1, rather than this paragraph, without any separate consideration for any material financial affects on the official’s real property as a result of the decision.”

These sections are not applicable since the CRD boundaries were previously established and will not be affected by the decision on the Guidelines. However, the Commissioner’s residence is within 500 feet of commercial property that will be subject to the Guidelines. While the newly adopted regulation maintains the previous 500 foot rule, it recognizes that under some circumstances the value of the official’s property may be unaffected by a decision on a subject property within 500 feet of the official’s property, and allows the Commission to issues advice negating the rule when the effect may not be considered material. (Regulation 18705.2(a)(11).)

We see no facts that suggest that the financial effect of the Guidelines, if any, will be material on residential property in the area. Moreover, the nearest commercial parcel that would be subject to the Guidelines, while within 500 feet, is separated from the Commissioner’s residence by several other independently-owned residential properties. Therefore, the proximity of the Commissioner’s residence to properties subject to the Guidelines would not create a conflict of interest.

Office Building: With respect to his commercial property, Regulation 18705.2(a)(11) provides that commercial property is not analyzed under the real property rules, but rather under Regulation 18705.1. (Regulation 18705.2(a)(11).) Under the current business entity rule, assuming the business is not owned by a publically traded business and the business is a relative small business enterprise, the effect is considered material only if one of the following is true:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

You stated that the decision in question was to merely recommend adoption of “guidelines” rather than imposing any new requirements or conditions that would impact real property in the CRD, or other properties outside the CRD. We see no facts to suggest that the establishment of guidelines within the existing CRD could foreseeably financially affect the Commissioner’s office property to the extent set forth in Regulation 18705.1. Thus, Commissioner Thompson will not have a conflict of interest participating in the decision.

2. The Commissioner does not have a conflict of interest in the selection of the consultant.

In this case, we need not analyze whether the establishment of the Core’s boundaries will result in a conflict of interest. The formation and the boundaries of the Core have already been established. The only issue before us is whether the Commissioner may now vote on the selection of a consultant to develop the master plan for the Core.

Generally, the conflict of interest rules of the Act are applied on a decision-by-decision basis. For example, even related decisions can be analyzed separately. In cases where an official has a conflict of interest with one decision, he or she is not disqualified from other decisions so long as they are not inextricably interrelated. Regulation 18709 provides the method for segmentation of a governmental decision:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

Based on Regulation 18709, the Commissioner may participate in the selection of the consultant so long as (1) the decision on selecting a consultant will not result in a reopening of, or otherwise financially affect, a decision in which he has a conflict of interest, and (2) so long as the Commissioner does not have an independent interest in the consultants bidding on the contract (such as having received income from them in the prior 12 months).

With respect to the second part of your question, it is impossible to provide formal advice concerning future decision to implement the master plan since the decisions that may come before the Commissioner are unknown. Once specific decisions are presented to the Planning Commission, you should contact us for further advice.

3. The Commissioner has a conflict of interest with respect to the Second Unit Ordinance and may not participate in the decision.

The Planning Commission will be considering a proposal to allow new second residential units on any residentially zoned lots in the CRD (regardless of lot size), but limit the second units to efficiency units/studios (i.e. max of 400 to 600 square feet.) In addition, the proposal would allow carports or garages for second units and require just one covered parking space for second unit.

The Commissioner owns residential property in the CRD that would be directly subject to the new rule. Therefore, the Commissioner may not participate in the amendment of the second unit ordinance. (Regulation 18705.2(a)(5).)

4. If the Commissioner has a conflict of interest in any of the decisions, he may participate in his personal capacity as a member of the public.

You also asked if the Commissioner could, despite a conflict of interest, participate in his personal capacity. A public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her “personal interests.” (Regulation

18702.4(a)(2), (b)(1).) Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. An official's "personal interests" include an interest in real property or business entity that is wholly owned by the official or members of his or her immediate family. (Regulation 18702.4(b)(1)(A) and (B).)

Please note, we have consistently advised that this exception is very narrow and is not intended to apply to every decision in which an official has a conflict of interest, but only those decisions where the official's personal economic interests will be affected and no one else but the official can represent his concerns relative to those interests. Consequently, the exception would not permit an official to represent anyone else's interest. In fact, we have cautioned that comments should be strictly limited to the official's personal interests, and the official should make clear that he or she is not speaking in the interest of any other person or group, and that he or she is not acting in an official capacity. (See *Simonian* Advice Letter, No. A-09-174 and *Adams* Advice Letter, No. I-06-129.)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

ENCLOSURES

Regulations 18705.2 and 18706 (as amended April 17, 2014)